Food Services of America, Inc., a Subsidiary of Services Group of America, Inc. *and* Paul Louis Carrington. Case 28–CA–063052

May 30, 2014

DECISION AND ORDER

BY MEMBERS MISCIMARRA, HIROZAWA, AND SCHIFFER

On March 27, 2012, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The Charging Party filed exceptions, and the Respondent filed an answering brief. The General Counsel filed cross-exceptions and a supporting brief, the Respondent filed an answering brief, and the General Counsel filed a reply brief.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions only to the extent consistent with this Decision and Order; to amend his remedy; to adopt his recommended Order as modified and set forth in full below; and to substitute a new notice.[3]

The Respondent is a food service distributor that sells food, paper products, and cleaning supplies, among other items, to institutions throughout the western United States. The complaint alleges that the Respondent committed a host of violations of Section 8(a)(1) of the Act, including discharging two employees for engaging in protected concerted activities, maintaining several overly broad employment policies, threatening employees, interrogating an employee about protected concerted activity, and creating an impression that it was engaged in surveillance of those activities. The judge dismissed the bulk of the complaint's allegations. We adopt most of these findings for the reasons he stated.[4] As explained

[1] There were no timely filed exceptions to the judge's findings that the Respondent violated Sec. 8(a)(1) of the Act by (1) maintaining in its employee handbook an overly broad restriction on discussing employee compensation, and (2) maintaining in its confidentiality and nondisclosure agreement (the confidentiality agreement) an overly broad restriction on disclosing payroll or employee information. In light of those uncontested findings, we find it unnecessary to pass on the General Counsel's argument that the handbook policy and the confidentiality agreement are unlawful on the additional ground that they threaten employees with unspecified reprisals if they were to violate them. Because we are ordering the Respondent to rescind or revise these confidentiality restrictions, additionally finding the alleged threats would not materially affect the remedy. We add, however, the following observations. Any employer rule that does not expressly state how violations will be dealt with implies, necessarily, a threat of unspecified consequences. Such an implicit threat is inseparable from the very concept of a rule imposed on employees by their employer, and it is precisely this implicit threat that furnishes the basis for the principle that mere maintenance of a rule may chill employees in exercising their rights. If a rule is found unlawful as having a reasonable tendency to chill employees in the exercise of their Sec. 7 rights, that finding already assumes and reflects the threat implicit in the rule. Thus, we see no purpose in redundantly alleging or finding the rule unlawful as threatening unspecified reprisals.

[2] The General Counsel and the Charging Party have implicitly excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] We shall substitute a new notice to conform to the Order as modified and with our decision in *Durham School Services*, 360 NLRB No. 85 (2014). We deny the General Counsel's motion to amend the complaint to allege that the Respondent violated Sec. 8(a)(1) of the Act by blocking messages from former employee Elba Rubio's personal email account to its employees' company email accounts for the purpose of preventing her from asking them for employment references. After a case has been transferred to the Board, a motion to amend the complaint may be granted "upon such terms as may be deemed just." Sec. 102.17 of the Board's Rules & Regulations. Under the circumstances, we find that permitting the amendment would not be just. The General Counsel seeks to add an allegation that departs significantly from the allegations contained in the complaint and litigated by the parties. Because the Respondent lacked sufficient notice and opportunity to respond to the proposed allegation, we deny the General Counsel's motion to amend.

[4] In adopting the judge's dismissal of the allegation that the Respondent violated Sec. 8(a)(1) of the Act by discharging employee Paul Carrington, we agree with the judge that Carrington engaged in unprotected conduct when he transferred hundreds of business emails from his company email account to his and Elba Rubio's personal email accounts. A significant number of those emails contained confidential business information. See *Beckley Appalachian Regional Hospital*, 318 NLRB 907, 908–909 (1995) (nurse's use of confidential patient records in disciplinary hearing found unprotected); *International Business Machines Corp.*, 265 NLRB 638, 638 (1982) (employee's distribution of employer's confidential internal compensation data to support employment discrimination complaints found unprotected). On exception, the General Counsel argues that, because Carrington was discharged for violating the Respondent's unlawful confidentiality restrictions, his discharge was unlawful even assuming that his mass email transfer was unprotected. See *Continental Group, Inc.*, 357 NLRB No. 39, slip op. at 4 (2011). We reject that argument. Carrington's unnecessary disclosure to Rubio of a significant amount of confidential business information had only the slightest connection, if any, to his legitimate Sec. 7 interest in documenting Rubio's claims of harassment and discrimination as well as his own satisfactory job performance. Under the particular circumstances of this case, Carrington's actions were so egregious that the chilling impact on employees' exercise of their Sec. 7 rights due to the Respondent's reliance on its confidentiality restrictions in discharging Carrington would be minimal. Member Miscimarra agrees that the Respondent lawfully discharged employee Paul Carrington for engaging in the unprotected conduct of disclosing confidential business information. He does not apply or rely on *Continental Group*, supra.

below, however, we find, contrary to the judge, that the Respondent violated Section 8(a)(1) of the Act by discharging Elba Rubio because of her protected concerted discussions with employee Michelle Aparicio; by informing employee Paul Carrington that he could have a future with the company if he stopped talking to Rubio; and by maintaining an overly broad no-solicitation policy.

1. Elba Rubio's Discharge

Rubio worked for the Respondent as a supplier e-commerce specialist until her discharge on March 4, 2011.[5] Rubio worked alongside her boyfriend, Paul Carrington, whom the Respondent employed as a supplier information specialist. Rubio and Carrington were supervised by Merissa Hamilton. Hamilton and Rubio were once close friends, but their relationship began to deteriorate in the fall of 2010. In November 2010, Hamilton sent Rubio several email messages in which she discussed her religious beliefs and implied that Rubio would be more "promotable" if she adopted those beliefs. In January, Rubio complained to Hamilton's superiors about these messages. Hamilton's supervisor directed Hamilton to stop discussing religion with her supervisees, but he did not issue her any written discipline. Rubio later learned that Hamilton had been coached about the issue. There is no evidence that Hamilton continued to attempt to proselytize Rubio or any other employee.

Meanwhile, in October 2010, the Respondent hired a friend of Rubio's, Michelle Aparicio, as a part-time item administrator, based in part on Rubio's recommendation. The relationship between Rubio and Aparicio began to sour in the months following Aparicio's hire, however, as a result of Aparicio's performance issues. Rubio testified that Aparicio had difficulty keeping up with her work and repeatedly asked the same questions. Carrington similarly testified that Aparicio took an unusual amount of time to train and did not perform as well as others in the department. Hamilton testified that Aparicio, like every employee, had made some excusable mistakes, but Rubio testified without contradiction that Hamilton criticized Aparicio's job performance and "berated" Rubio for recommending Aparicio for hire.[6] Thus, the record establishes that Rubio had reason to believe not only that Aparicio's job was in jeopardy, but also that Aparicio's poor performance was negatively affecting Hamilton's view of Rubio herself.

Beginning in December 2010, Rubio began telling Aparicio every other day that Aparicio was going to be fired. As a result of those discussions, Aparicio began looking for other employment, and Rubio assisted her by sending her website links to other job opportunities. Notably, Aparicio did not complain to Rubio that she felt harassed or hounded by Rubio's repeated predictions.

On February 25, Rubio initiated an exchange of instant messages with Aparicio. Motivated by her belief that the Respondent had not taken her complaints about Hamilton's proselytizing seriously, and her belief that Hamilton had exhibited some national origin bias, Rubio proposed that she and Aparicio have a discussion in Spanish in front of Hamilton to see if she would get upset and "say something stupid." Aparicio declined. Rubio then raised the subject of Hamilton's displeasure with Aparicio's performance, her inadequate training, and her risk of discharge. She wrote in part:

> [Hamilton]'s super-mad with me because it's really difficult for you with this job. She's pissed off that I recommended you without knowing . . . .
>
> And the only reason she hasn't fired you is because she has to prove that you can't do the job and because she was scolded for the way the guy who quit [sic] [.]

Rubio also complained to Aparicio that Hamilton had not let her train Aparicio well at the outset. Rubio's instant message to Aparicio also stated: "If you don't understand what she's explaining to you, you are worth nothing. If you don't understand something, just play dumb and ask me or Paul through IM."

In late February, Hamilton asked Aparicio why her performance had been declining and why she had become less communicative. Aparicio replied that Rubio had repeatedly told her that she was going to be fired, and she provided Hamilton with a copy of Rubio's February 25 instant messages. Disturbed by this news, Hamilton informed her superiors and showed them the instant messages.

On March 4, the Respondent discharged Rubio. The judge implicitly credited Senior Vice President Steve Manuszak's testimony that Rubio was discharged because she had "harassed" Aparicio by allegedly lying to her and telling her that she was going to be fired and for

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In adopting the judge's dismissal of the allegation that the Respondent violated Sec. 8(a)(1) of the Act by maintaining a policy prohibiting employees from disclosing their cell phone numbers to each other, we note that the General Counsel failed to prove that the Respondent actually maintained such a policy.

[5] All dates are in 2011 unless noted otherwise.

[6] The judge summarized the testimony of Rubio, Carrington, and Hamilton regarding their views of Aparicio's work performance without making any specific factual findings regarding the extent to which Aparicio did or did not meet the Respondent's expectations.

vindictively planning to manipulate and entrap Hamilton by speaking Spanish around her.

In finding no violation for Rubio's discharge, the judge found that the only arguably protected concerted activity that Rubio had engaged in was her complaint to management in January about Hamilton's religious emails. The judge found no evidence that the Respondent harbored any animus against Rubio for making that complaint and no evidence of a connection between this complaint and her discharge, which occurred 2 months later. The judge instead found that Rubio was discharged because of her February 25 instant messages to Aparicio, implicitly finding, without explanation, that those instant messages did not constitute protected concerted activity.

We agree with the judge, for the reasons he stated, that the record fails to show that Rubio's complaint to management about Hamilton's religious overtures played any role in the Respondent's decision to discharge her. Contrary to the judge, however, we find that Rubio was engaged in protected concerted activity when, in the February 25 instant messages and during many conversations in the preceding months, Rubio told Aparicio that her job was in jeopardy. Because the Respondent admits this activity was a significant reason for her discharge, and because the Respondent did not demonstrate that it would have discharged Rubio for lawful reasons even in the absence of her protected activity, we find the discharge violated the Act.[7]

Employee conduct is protected under Section 7 of the Act when it is "concerted and engaged in for the purpose of mutual aid or protection." *Hoodview Vending Co.*, 359 NLRB No. 36, slip op. at 3 (2012) (internal quotations omitted). Generally speaking, a conversation constitutes concerted activity when "'engaged in with the object of initiating or inducing or preparing for group action or [when] it [has] some relation to group action in the interest of the employees.'" *Meyers Industries*, 281 NLRB 882, 887 (1986) (*Meyers II*) (quoting *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964)), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987). Additionally, the Board has held that employee conversations about job security are "inherently concerted." *Hoodview Vending Co.*, 359 NLRB No. 36, slip op. at 3.

It is clear that one employee's warning to another that the latter's job is at risk constitutes protected conduct under the Act. In *Jhirmack Enterprises*, 283 NLRB 609 (1987), the Board found that employee Allison was engaged in protected concerted activity when she advised a coworker, Ramsey, that several other employees had complained to management about his slow rate of work. The Board found that Allison's purpose in relaying the complaints to Ramsey was "to encourage him to take corrective action to protect his job." Id. at 609 fn. 2. Consequently, the Board found that "Allison's conduct was clearly undertaken for the mutual aid and protection of a fellow employee and therefore constituted actual protected concerted activity." Id. That Ramsey was upset by Allison's news did not affect the Board's finding. See also *Tracer Protection Services*, 328 NLRB 734, 740–741 (1999) (holding that "a communication from one employee to another in an attempt to protect the latter's employment constitutes protected concerted activity").

Consistent with the precedent cited above, we find that Rubio's discussions with Aparicio, by instant message and in person, were protected by the Act. Because Rubio and Aparicio were discussing Aparicio's job security, those conversations were inherently concerted. *Hoodview Vending Co.*, 359 NLRB No. 36, slip op. at 3. Moreover, Rubio's discussion with Aparicio by instant message on February 25 contemplated group action: Rubio proposed that Aparicio approach Rubio or Carrington for help with tasks that Aparicio did not understand to avoid irritating Hamilton.

Additionally, we find that the conversations between Rubio and Aparicio were for employees' "mutual aid or protection." As explained in *Tracer Protection,* 328 NLRB at 741, and *Jhirmack*, 283 NLRB at 609 fn. 2, one employee's communication to another in an attempt to protect the latter's employment satisfies Section 7's "mutual aid or protection" requirement. Moreover, Rubio testified without contradiction that she informed Aparicio about her risk of discharge because Hamilton had criticized Aparicio's job performance and had "berated" Rubio for recommending Aparicio for employment. Rubio further testified without contradiction that she believed that "people who weren't doing their job correctly usually got written up and terminated." Accordingly, we find that Rubio initiated the conversations to encourage

[7] In its answering brief, the Respondent asserts that the General Counsel did not argue to the judge that Rubio's February 25 instant messages constituted protected concerted activity, thereby hinting at an argument that the issue is not properly before the Board. We disagree. Par. 4(d) of the complaint alleges that Rubio and other employees engaged in protected concerted activity by complaining amongst themselves about the Respondent's alleged national origin and religious discrimination, favoritism toward certain employees, insufficient training of employees, and other matters concerning wages, hours and working conditions. Further, the General Counsel, in his post-hearing brief to the judge, broadly argued that Rubio engaged in protected concerted activities by speaking, emailing, and instant messaging with her colleagues about working conditions. Rubio's February 25 instant messages, which were a focus of the hearing and the Respondent's stated reason for her discharge, fall well within the language of the complaint and the General Counsel's arguments to the judge.

Aparicio to improve her job performance for Aparicio's sake and also to curtail Hamilton's criticism of Rubio herself.[8]

We reject the Respondent's argument that Rubio's statements to Aparicio were unprotected because the Respondent never intended to terminate Aparicio. Employee statements are unprotected if they are shown to be maliciously untrue, i.e., if they are knowingly false or made with reckless disregard for their truth or falsity. See, e.g., *Valley Hospital Medical Center*, 351 NLRB 1250, 1252 (2007), enfd. sub nom. *Nevada Service Employees Union, Local 1107, SEIU v. NLRB*, 358 Fed. Appx. 783 (9th Cir. 2009). Hamilton's testimony that she had no plan or desire to discharge Aparicio, if true, shows at most that Rubio's statements were inaccurate, not that they were maliciously untrue. See, e.g., *Sprint/United Management Co.*, 339 NLRB 1012, 1018 (2003). Again, Rubio testified without contradiction that her statements were based on Hamilton's repeated criticism of Aparicio's work performance as well as Hamilton's castigation of Rubio for recommending that Aparicio be hired. Rubio may have misjudged Hamilton's intended course of action, but there is no evidence of malice.

We also reject the Respondent's characterization of Rubio's statements to Aparicio as "harassment" unprotected by the Act. It is true that Rubio frequently repeated her statements to Aparicio and that Aparicio felt distressed about the prospect of losing her livelihood. Neither the repetition nor the impact of Rubio's statements renders them unprotected, however. See *Jhirmack*, 283 NLRB at 609 (finding protected employee's statements about a coworker's poor performance despite fact that statements upset coworker); see also *Ryder Transportation Services*, 341 NLRB 761, 761 (2004) (It is well settled that the Act allows employees to engage in persistent union solicitation even when it annoys or disturbs the employees who are being solicited.), enfd. sub nom. *Ryder Truck Rental v. NLRB*, 401 F.3d 815 (7th Cir. 2005). We further emphasize that Aparicio never complained to Rubio that she felt harassed by Rubio's comments and never asked Rubio to stop making them. Under these circumstances, we do not find that Rubio engaged in unprotected harassment of Aparicio.[9]

Because the General Counsel has proved that protected concerted activity was a motivating factor in Rubio's discharge, the burden shifts to the Respondent to prove that it would have discharged Rubio on March 4 for nondiscriminatory reasons even absent Rubio's protected activity. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). The Respondent contends it would have discharged Rubio regardless of her protected concerted activity for soliciting Carrington to forward to Rubio company emails supporting her claims of religious harassment and retaliation, which resulted in Carrington sending a significant amount of confidential business information outside the company to a former employee. That defense, however, obviously lacks merit because the Respondent discharged Rubio *before* she engaged in that alleged misconduct. See *Hawaii Tribune-Herald*, 356 NLRB No. 63, slip op. at 2 (2011) (where alleged misconduct occurs after a discharge, "[t]here can be no issue whether it did or could have justified th[e] discharge"), enfd. 677 F.3d 1241 (D.C. Cir. 2012).

[8] Member Miscimarra does not reach or rely upon the majority's discussion of the elements of "concerted" activity and "mutual aid or protection," including the majority's reference to "inherently concerted" conduct, and he disagrees with his colleagues' finding that Rubio's statements to Aparicio constituted protected concerted activity. Like the judge, Member Miscimarra would dismiss the complaint's allegation that Rubio's discharge was unlawful. Member Miscimarra believes Rubio's actions were unprotected because, among other things, she instructed Aparicio to remain on the job and disregard her supervisor, Hamilton (for example, instructing Aparicio to "just play dumb and ask me or Paul [Carrington] through IM" "[i]f you don't understand something [Hamilton is explaining]"). In so instructing Aparicio, Rubio did not advocate a permissible protest, work stoppage, or other protected concerted activity. Cf. *Krist Oil Co.*, 328 NLRB 825, 830 (1999) (explaining that "the accepted industrial norm is that if an employee is working, and there is a claim of employer misconduct directed at her, the employee should continue to work, make the claim, and subsequently receive a remedy for any proven misconduct."). The record also reveals that Respondent lawfully focused on this aspect of Rubio's misconduct, as evidenced in the subsequent conversation between Senior Vice President Bixby and Paul Carrington (Rubio's boyfriend) after Rubio's discharge. Bixby stated that Carrington would have a "future" if he "stopped talking to [Rubio] and tried to move on and *learn how to work with [Hamilton]*." As indicated in fn. 11, infra, Member Miscimarra disagrees with the majority's finding that this conversation constituted an unlawful threat of unspecified reprisals unless Carrington ceased having discussions with Rubio; in Member Miscimarra's view, the record renders implausible such an interpretation of this conversation.

[9] We disagree with our dissenting colleague that Rubio's February 25 instant messages are unprotected because they constituted an attempt by her to subvert Supervisor Hamilton. The Respondent does not argue that it viewed Rubio's "play dumb" remark as subversive of Hamilton's authority, that it discharged her for that reason, or that this remark rendered unprotected Rubio's separate statements that Aparicio's job was in jeopardy. In any event, we do not read Rubio's "play dumb" remark as an instruction to disobey Hamilton. Rubio merely suggested that Aparicio ask her coworkers for help with tasks she did not understand to avoid the ire of Hamilton.

The General Counsel argues that Rubio was also engaged in protected concerted activity when she proposed to Aparicio that they speak Spanish near Hamilton to provoke a response. It is unnecessary to pass on this issue. We have already found that Sec. 7 of the Act protected other statements that motivated Rubio's discharge, and the Respondent does not contend that, even absent those other protected statements, it would have discharged Rubio for planning to provoke Hamilton.

The Respondent alternatively argues that, in light of Rubio's postdischarge conduct, she should be denied the usual remedies of reinstatement and backpay. For the Board to deny these remedies, the Respondent must prove that Rubio engaged in postdischarge misconduct "'so flagrant as to render [her] unfit for further service, or a threat to efficiency in the plant.'" Id. (quoting *O'Daniel Oldsmobile, Inc.*, 179 NLRB 398, 405 (1969)). That standard is not met here. After her discharge, Rubio asked Carrington to forward work emails to her documenting Rubio's complaints of religious harassment and retaliation. As described above, Carrington responded by forwarding not only emails documenting Rubio's complaints, but numerous emails containing confidential business data. The Respondent points to no evidence that Rubio asked Carrington to transfer this confidential information, and there is no basis to find that she reasonably foresaw that Carrington would do so in response to her request. As a result, we find that the Respondent has not established that Rubio is "unfit for further service" or a threat to efficiency in the workplace. Therefore, we shall award the traditional remedies for her unlawful discharge. Cf. *LA Film School, LLC*, 358 NLRB No. 21, slip op. at 1 fn. 2 & 12 (2012) (finding that employer failed to prove that discriminatee was responsible for deleting her hard-drive partition after discharge and ordering reinstatement and backpay).

2. Vice President Bixby's Conversation with Employee Carrington

On Friday, March 4, shortly after the Respondent discharged Rubio, Senior Vice President Bixby summoned Carrington to his office and informed him that "his name had come up as being connected with [Rubio's]." Bixby also told Carrington that "[he] could really have a future with the company if [he] stopped talking to [Rubio] and tried to move on and learn how to work with [Hamilton]," and that Carrington could "come in with a clean slate on Monday." We agree with the judge that these statements did not constitute an unlawful interrogation of Carrington or create the impression that the Respondent was engaging in surveillance of employees' protected concerted activities.[10] However, contrary to the judge, we find that Bixby implicitly threatened Carrington with unspecified reprisals. Given that the Respondent had just discharged Rubio for engaging in protected concerted discussions with Aparicio, Carrington would reasonably understand Bixby to be saying that Carrington's "clean slate" would be sullied, and his future with the company jeopardized, if he thereafter spoke with Rubio. There was no reason for Carrington to think that protected concerted discussions were exempted from Bixby's thinly veiled threat. Thus, we conclude that the Respondent, by Bixby, violated Section 8(a)(1) of the Act by implicitly threatening Carrington with unspecified reprisals if he were to engage in protected concerted discussions with Rubio.[11]

3. The Respondent's Solicitation Policy

The Respondent maintains the following solicitation policy in an employee handbook distributed to all new employees:

> Solicitation discussions of a non-commercial nature, by Associates, are limited to the non-working hours of the solicitor as well as the person being solicited and in non-work areas. (Working hours do not include meal breaks or designated break periods.)

We find, contrary to the judge, that the above rule unlawfully restricts Section 7 activity because it prohibits solicitation, including union solicitation, in work areas during nonwork time. Absent special circumstances not present here, "[e]mployers may ban solicitation in working areas during working time but may not extend such bans to working areas during nonworking time." *UPS*

[10] In adopting the judge's dismissal of the interrogation allegation, we note that an employer's declarative statements can constitute an interrogation where those statements reasonably call for an employee to respond and reveal whether he or she has engaged in protected activity. See, e.g., *Children's Services International*, 347 NLRB 67, 79–80 (2006) (finding that manager interrogated employee when she accused her of creating a union flyer). Bixby's comments, however, did not call for such a response from Carrington.

[11] The complaint alleges that, in this conversation, Bixby "orally promulgated an overly broad and discriminatory rule prohibiting its employees from talking to other employees." We disagree. Bixby's statement to a single employee did not amount to the promulgation of a rule of general applicability. See *Flamingo Las Vegas Operating Co.*, 359 NLRB No. 98, slip op. at 2 (2013); *St. Mary's Hospital of Blue Springs*, 346 NLRB 776, 777 (2006).

Contrary to his colleagues, Member Miscimarra would dismiss the complaint's allegation that the Respondent, through Bixby, threatened Carrington with unspecified reprisals. In Member Miscimarra's view, Bixby's comment to Carrington after Rubio's discharge—to the effect that Carrington should "move on and learn how to work with [Hamilton]" and come in with a "clean slate on Monday"—was a permissible statement that Carrington needed to take direction from his supervisor, in contrast with Rubio's repeated efforts to subvert Hamilton (which included, as noted previously, Rubio's message that Aparicio should "play dumb" when receiving instructions from Hamilton and instead consult Rubio or Carrington). Member Miscimarra disagrees with the majority's finding that Bixby threatened Carrington with unspecified reprisals when Bixby said that Carrington would have a "future" if he "stopped talking to Rubio." This comment was made in the context of Bixby discussing the need for Carrington to accept direction from Supervisor Hamilton (who Rubio repeatedly undermined); the record reveals it is implausible to regard Bixby's comment as a literal demand that Carrington—Rubio's boyfriend—cease having discussions with Rubio.

Supply Chain Solutions, 357 NLRB No. 106, slip op. at 2 (2011) (citing *Restaurant Corp. of America v. NLRB*, 827 F.2d 799, 806 (D.C. Cir. 1987) ("[A]n employer may not generally prohibit union solicitation . . . during nonworking times or in nonworking areas.")). The rule at issue here expressly provides that solicitations are limited to nonworking hours "*and* . . . non-work areas" (emphasis added), indicating that both conditions must be satisfied before solicitation is permitted. The Respondent argues that the rule permits solicitation in work areas when both employees are on nonwork time. Perhaps that was what the Respondent meant to say, but it is not what the rule says. Accordingly, by maintaining the rule, the Respondent violated Section 8(a)(1).

AMENDED CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Respondent violated Section 8(a)(1) of the Act by maintaining the provisions relating to compensation and confidentiality in its employee handbook and the restriction on discussing payroll or information about other employees contained in its confidentiality and nondisclosure agreement.
3. The Respondent violated Section 8(a)(1) of the Act by discharging Elba Rubio for engaging in protected concerted activity.
4. The Respondent violated Section 8(a)(1) of the Act by implicitly threatening employee Paul Carrington with unspecified reprisals if he were to speak with employee Elba Rubio.
5. The Respondent violated Section 8(a)(1) of the Act by maintaining in its employee handbook a rule that prohibits employees from engaging in solicitation in work areas during nonwork time.

AMENDED REMEDY

In addition to the remedies recommended by the judge, we shall order the Respondent to take the following affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent violated Section 8(a)(1) of the Act by discharging Elba Rubio because she engaged in protected concerted activity, we shall order the Respondent to offer her full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed. We shall further order the Respondent to make Rubio whole for any loss of earnings and other benefits suffered as a result of its unlawful conduct. Backpay shall be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). We will order the Respondent to compensate Elba Rubio for the adverse tax consequences, if any, of receiving a lump-sum backpay award and to file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

We shall additionally order the Respondent to preserve and provide all records necessary to analyze the amount of backpay due to Rubio. Further, we shall order the Respondent to remove from its files any and all references to Rubio's unlawful discharge and to notify her in writing that this has been done and that the discharge will not be used against her in any way.

Having found that the Respondent violated Section 8(a)(1) by threatening Paul Carrington with unspecified reprisals if he were to speak with Elba Rubio and by maintaining unlawful restrictions in its employee handbook and its confidentiality and nondisclosure agreement, we shall order the Respondent to cease and desist from such unlawful conduct and to rescind the unlawful restrictions.

The standard affirmative remedy for maintenance of unlawful work rules is immediate rescission of the offending rules; this remedy ensures that employees may engage in protected activity without fear of being subjected to the unlawful rule. *Guardsmark, LLC*, 344 NLRB 809, 812 (2005), enfd. in relevant part 475 F.3d 369 (D.C. Cir. 2007). Pursuant to *Guardsmark*, the Respondent may comply with the Order by rescinding the unlawful handbook rules and republishing its employee handbook without them. We recognize, however, that republishing the handbook could entail significant costs. Accordingly, the Respondent may supply the employees either with handbook inserts stating that the unlawful rules have been rescinded, or with new and lawfully worded rules on adhesive backing that will cover the unlawfully worded rules until it republishes the handbook either without the unlawful provisions or with lawfully worded rules in their stead. Any copies of the handbook that are printed with the unlawful rules must include the inserts before being distributed to employees. Id. at 812 fn. 8.

In addition to the physical posting of paper notices, the Respondent shall be required to distribute the notices electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. *J. Picini Flooring*, 356 NLRB No. 9 (2010).

ORDER

The Respondent, Food Services of America, Inc., a subsidiary of Services Group of America, Inc., Scottsdale, Arizona, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees because they engage in protected concerted activities.

(b) Maintaining the compensation provision in its employee handbook, as further explained by the confidentiality provision contained therein.

(c) Maintaining a mandatory confidentiality and nondisclosure agreement that employees would reasonably interpret as restricting their rights to discuss their terms and conditions of employment.

(d) Maintaining a rule in its employee handbook that prohibits employees from engaging in solicitation in work areas during nonwork time.

(e) Threatening employees with unspecified reprisals if they speak with other employees, including about terms and conditions of employment.

(f) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the compensation provision contained in its employee handbook.

(b) Rescind the no-solicitation rule in its employee handbook.

(c) Furnish all current employees with inserts for the current employee handbook that (1) advise that the unlawful rules have been rescinded, or (2) provide the language of lawful rules; or publish and distribute a revised employee handbook that (1) does not contain the unlawful rules, or (2) provides the language of lawful rules.

(d) Rescind the confidentiality and nondisclosure agreement or revise it to remove any language that prohibits or may reasonably be read to prohibit employees from discussing wages or other terms and conditions of employment.

(e) Notify all current employees that the confidentiality and nondisclosure agreement has been rescinded or, if it has been revised, provide them a copy of the revised agreement.

(f) Within 14 days from the date of this Order, offer Elba Rubio full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(g) Make Elba Rubio whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the amended remedy section of this decision.

(h) Compensate Elba Rubio for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

(i) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(j) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Elba Rubio, and within 3 days thereafter, notify Elba Rubio in writing that this has been done and that the discharge will not be used against her in any way.

(k) Within 14 days after service by the Region, post at its Scottsdale, Arizona facility copies of the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 22, 2011.

(l) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region at-

[12] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

testing to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. May 30, 2014

Philip A. Miscimarra, Member

Kent Y. Hirozawa, Member

Nancy Schiffer, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for engaging in protected concerted activities.

WE WILL NOT maintain the Compensation provision in our employee handbook, as further explained by the Confidentiality provision contained therein.

WE WILL NOT maintain a mandatory confidentiality and nondisclosure agreement that you would reasonably interpret as restricting your right to discuss your terms and conditions of employment.

WE WILL NOT maintain a rule in our employee handbook that prohibits employees from engaging in solicitation in work areas during nonwork time.

WE WILL NOT threaten you with unspecified reprisals if you speak with other employees, including about terms and conditions of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the Compensation provision contained in our employee handbook.

WE WILL rescind the no-solicitation rule in our employee handbook.

WE WILL furnish all current employees with inserts for the current edition of the employee handbook that (1) advise that the unlawful rules, above, have been rescinded, or (2) provide the language of lawful rules; or publish and distribute to all current employees a revised employee handbook that (1) does not contain the unlawful provisions, or (2) provides the language of lawful rules.

WE WILL rescind the Confidentiality and Nondisclosure Agreement or revise it to remove any language that prohibits or may reasonably be read to prohibit you from discussing wages or other terms and conditions of employment.

WE WILL notify you that the Confidentiality and Nondisclosure Agreement has been rescinded or, if it has been revised, provide you with a copy of the revised agreement.

WE WILL, within 14 days from the date of the Board's Order, offer Elba Rubio full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Elba Rubio whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest.

WE WILL compensate Elba Rubio for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Elba Rubio, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

FOOD SERVICES OF AMERICA, INC.

The Board's decision can be found at www.nlrb.gov/case/28-CA-063052 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273–1940.

Johannes Lauterborn, Esq., for the General Counsel.
Richard Walker, Esq. (Walker & Peskind, PLLC), for the Respondent.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me on January 24–27, 2012, in Phoenix, Arizona. The complaint here, which issued on October 31, 2011,[1] and was based upon an unfair labor practice charge filed on August 22 by Paul Louis Carrington, alleges that the Respondent has maintained overly broad and discriminatory rules of confidentiality and nondisclosure that its employees are required to sign and which are also contained in its employee handbook. The complaint further alleges that Respondent, by Scott Bixby, its senior vice president, interrogated its employees about their concerted activities, orally promulgated an overly broad and discriminatory rule prohibiting its employees from talking to other employees, threatened its employees with unspecified reprisals if they engaged in concerted activities, and created an impression among its employees that their concerted activities were under surveillance by the Respondent. At the conclusion of his case, counsel for the General Counsel moved to amend the complaint to also allege that Respondent violated Section 8(a)(1) of the Act by promulgating overly broad rules prohibiting employees from giving personal references and prohibiting employees from disclosing personal telephone numbers. Finally, the complaint alleges that the Respondent further violated Section 8(a)(1) of the Act by discharging Carrington (on March 7) and Elba Rubio (on March 4) because they engaged in, or because Respondent believed that they engaged in, protected concerted activities.

I. JURISDICTION

Respondent admits, and I find, that it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. FACTS AND ANALYSIS

A. Confidentiality and Nondisclosure Allegations

Upon beginning employment with the Respondent, employees must sign its confidentiality and nondisclosure agreement, which states, inter alia:

> As a condition of Services Group of America granting you access to its confidential information, the value of which you hereby acknowledge and in addition to any other confidentiality agreements and obligations that govern your conduct, you agree to the following requirements regarding your access to the Company's confidential information:
>
> "Confidential information" means any and all information, whenever accessed or received, related to Company or any affiliate, including but not limited to, information relating to: financial matters, business plans, strategies, customers, marketing, product or service promotions, purchasing, vendors, discounts, rebates, earned marketing income ("EMI"), EMI tracking methods, payroll or employee information (other than payroll or employee information about Associate), business techniques, business tools· (including, without limitation, Company's B/I, EIS, payroll and infinium systems), analysis, contractual terms, costs, margins, ownership structure, financings or other information. Confidential Information does not include information that is generally available to the public through no improper action or inaction or breach of Associate.
>
> Confidentiality; Ownership. Associate understands that Company and its affiliates value highly their Confidential Information, which they have developed at substantial cost and effort, and which are important Company and affiliate assets. Associate agrees that he or she will strictly maintain the confidentiality and proprietary nature of any and all Confidential Information. Associate agrees not to use or disclose any Confidential Information, directly or indirectly, except in furtherance of the Company's business or as consented to in writing in each instance by a Company officer, or, upon reasonable prior notice to Company, as required by law. Associate agrees not to access, read, forward, remove from Company premises, copy, or otherwise obtain or retain any Confidential Information except as necessary to perform his or her Job with the Company. This Agreement applies to Confidential Information in any form or format, including without limitation oral, visual, written, computer records, photographs and tape recordings, and applies to Confidential Information accessed by Associate before, as well as after, entering into this Agreement. This Agreement shall apply throughout Associate's employment with Company and after the termination of such employment at any time and for any reason (with or without cause) by Company or Associate. Associate acknowledges that Company and its affiliates are the sole owners of the Confidential Information.
>
> Associate disclaims any right, title or interest in or to the Confidential Information, including without limitation any Confidential Information developed by Associate. Upon termination of employment (for any reason) Associate agrees to return to the Company all documents, discs or other items containing Confidential Information.
>
> Remedies. Associate agrees that Company shall be entitled to preliminary and permanent injunctive relief, specific performance and other equitable relief, without the necessity of posting any bond or other security, in aid of litigation, or arbitration, if any arbitration agreement is applicable, to prevent

[1] Unless indicated otherwise, all dates referred to here relate to the year 2011.

> any violation or threatened violation of this Agreement, in addition to any and all other legal or equitable remedies that may be available to Company. The protections afforded by this Agreement are intended to be and shall be in addition to any and all other protections afforded by law, equity, or agreement.

In addition, Respondent's employee handbook, distributed to all new employees, contains the following rules, also alleged to be overly restrictive, and to violate Section 8(a)(1) of the Act:

> SGA GUIDING PRINCIPLES
>
> . . .
>
> Outside of our company, we remain quiet and safeguard our proprietary knowledge.
>
> . . .
>
> COMPENSATION
>
> The Company views your salary as a confidential matter and encourages you to discuss questions or concerns only with your Department Manager or Branch President.
>
> CONFIDENTIALITY
>
> We are a privately-held company. While many of our competitors are free with disclosing their proprietary information, we have a very strict policy in that regard. No one outside the Company needs to know anything about our Company unless the Chairman or President has identified a specific benefit to the Company. This includes the press and news media in general and trade journals and industry groups in particular. The latter includes vendors, trade associations and competitors wherever we meet them (trade shows, seminars, conventions or other social/business functions). "Disinterested" third parties you meet at non-industry business functions or purely social occasions also do not need to know anything about our Company. Unauthorized disclosure of information about our Company, no matter how harmless it may seem, can be grounds for discipline up to an including termination.
>
> SOLICITATION
>
> . . .
>
> Solicitation discussions of a non-commercial nature, by Associates, are limited to the non-working hours of the solicitor as well as the person being solicited and in non-work areas. (Working hours do not include meal breaks or designated break periods.)

There is a very thin line between what information an employer may lawfully restrict employees from sharing or transmitting, and when such restrictions unlawfully hinder employees' Section 7 rights. Many recent Board cases are helpful in making this determination, but it remains a difficult one. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), stated: "The appropriate inquiry is whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights. Where the rules are likely to have a chilling effect on Section 7 rights, the Board may conclude that their maintenance is an unfair labor practice even absent evidence of enforcement." In *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004), the Board was more specific:

> Our inquiry into whether the maintenance of a challenged rule is unlawful begins with the issue of whether the rule *explicitly* restricts activities protected by Section 7. If it does, we will find the rule unlawful.
>
> If the rule does not explicitly restrict activity protected by Section 7, the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.

The agreement executed by employees beginning their employment with the Respondent defines "confidential information" as "any and all information . . . including but not limited to, information relating to . . . payroll or employee information (other than payroll or employee information about Associate)." The agreement states further: "Associate agrees that he or she will strictly maintain the confidentiality and proprietary nature of any and all Confidential Information" and "Associate agrees not to access, read, forward, remove from Company premises, copy or otherwise obtain or retain any Confidential Information except as necessary to perform his or her job with the Company." This rules excepts from the confidentiality definition payroll "information about Associate," in other words payroll information about the employee himself or herself; a reasonable reading of this provision is that each employee could discuss his/her terms and conditions of employment with fellow employees, or anybody else, without fear of discipline. However, the discussions of terms and conditions of employment requires the participation of two or more employees. If one of those employees refuses to permit the other employees to discuss his terms and conditions of employment, pursuant to the Respondent's rule, the discussion would be unduly restricted, or foreclosed entirely, thereby limiting the employees' protected concerted activities. I therefore find that this restriction violates Section 8(a)(1) of the Act as alleged in Paragraph 4(a) of the complaint. *Labinal, Inc.*, 340 NLRB 203, 210 (2003).

The employee handbook contains three statements regarding confidentiality. "SGA Guiding Principal" at page 4, states: "Outside of our company, we remain quiet and safeguard our proprietary knowledge," while under "Compensation" at page 10, the Handbook states: "The Company views your salary as a confidential matter and encourages you to discuss questions or concerns **only** with your Department Manager or Branch President." [emphasis supplied] Finally, under "confidentiality" the Handbook states at page 18: "No one outside the Company needs to know anything about our Company unless the Chairman or President has identified a specific benefit to the Company." Although the compensation provision set forth above only "encourages" employees to discuss their salaries with the department manager or branch president, rather than stating that discussions of salary with others are grounds for discipline, that sentence cannot be read in a vacuum. It says that the Respondent views salaries as a confidential manner and should only be discussed with the department manager or branch president,

with "only" underlined, and the confidentiality provision states that nobody outside the company needs to know anything about the Respondent's operation, and that unauthorized disclosure of information about the company can be grounds for discipline. I find that an employee reading these provisions together would reasonably feel that his/her Section 7 rights are being restricted. I therefore find that these provisions in the Employee Handbook violate Section 8(a)(1) of the Act.

Finally, under "Solicitation," at page 24, the employee handbook states:

> Solicitation discussions of a non-commercial nature, by Associates, are limited to the non-working hours of the solicitor as well as the person being solicited and in non-work areas. (Working hours do not include meal breaks or designated break periods.)

In *Barney's Club*, 227 NLRB 414, 416 (1976), the administrative law judge stated:

> The right of employees to self-organization has often come into conflict with the right of employers to maintain discipline in their establishments and to control the use of their property. Over the years, the Board and the courts have attempted to reconcile these conflicts through the formulation of rules of law which attempt to maximize the scope of the rights of each to the extent that they do not unduly diminish the rights of the other. . . In attempting to reconcile the legitimate interests of both employers and unions, the Board has looked at the nature of the business. Thus, the rules which have evolved relating to industrial establishments have not been applied to retail stores. [citations omitted]

In the instant situation, limiting solicitation to nonworking hours is clearly lawful, especially since the rule specifies that meal or break periods are not included in working hours. *Our Way, Inc.,* 268 NLRB 394 (1983). As the rule also limits solicitations to nonworking areas, the issue is whether this limitation is lawful. As it properly restricts solicitations to the time that employees are working, and in working areas, while allowing other solicitation, I find that this provision is lawful, and I therefore recommend that this allegation be dismissed. *Stoddard-Quirk Mfg., Co.*, 138 NLRB 615 (1962); *Golub Corp.*, 338 NLRB 515 (2002).

B. Discharges of Rubio and Carrington and Related 8(a)(1) Allegations

Admittedly, the Respondent discharged Rubio on March 4 and Carrington on March 7. The complaint alleges that the Respondent discharged them because they engaged in, or because the Respondent believed that they engaged in, protected concerted activities (allegedly discussing the Respondent's national origin and religious discrimination against its employees, favoritism toward certain employees, insufficient training of employees and other issues), and that it discharged Carrington because he violated Respondent's rules involving confidentiality and nondisclosure set forth above in Section A, and to discourage other employees from engaging in these and other concerted activities. Respondent defends that Rubio was discharged solely for harassing fellow employee Michelle Aparicio by falsely and maliciously telling her that the Respondent was not happy with her work and planned to fire her. Respondent defends that Carrington was fired 3 days later for coming into the office on Saturday, March 5, a day that he was not scheduled to work, accessing Respondent's email system, and transmitting over 300 emails, many of which contained Respondent's confidential trade secret and proprietary information, to Rubio's personal email address, and to his as well.

Respondent is a food service distributor operating from the State of Minnesota west to Northern California and Alaska, selling everything from food to paper products and cleaning supplies. It sells to institutions such as schools, universities, institutional food service providers, and prisons, as well as cruise lines and independently owned small food stores, but not to large grocery stores. In making these sales, the Respondent employs approximately 450 sales representatives who visit these customers regularly, and negotiate the products' price with each of these customers. Further, the Respondent purchases these products from thousands of different supplier (also called vendors), storing these products in its warehouses until they are sold, and delivered to the customers.

Rubio began her employment with the Respondent in May 2008 as a supplier information specialist. Three months later she applied for and obtained a position of transportation analyst for Gampac and worked there until June 2010, when she returned to the Respondent in the position of supplier e commerce specialist. Her supervisor during the entire period of her employment with the Respondent was Merissa Hamilton. Carrington began his employment with the Respondent in September 2008 as a supplier information specialist. He was laid off in August 2009 as part of a reduction in force by the Respondent and was rehired in November 2009 in the same position, the only laid-off employee who was rehired at that time. His supervisor during the entire period of his employment with the Respondent was also Hamilton.

The alleged protected concerted activity involving Rubio involved some unwanted religious interaction between Hamilton and Rubio, who is an agnostic, that was initiated by Hamilton. Rubio and Hamilton had been friends for some time, but this friendship ended when Hamilton began proselytizing regarding her religious convictions. There were a series of emails, initiated by Hamilton on November 7, 2010. The principal one from Hamilton to Rubio, states, inter alia:

> You need to listen more and stop assuming. I never said I was mad at you. I am a Christian which means that I don't hold hate or anger in my heart when someone does me wrong. I know you think being a Christian means something else, but again that would be an incorrect assumption…You seem to be offended by me…you get upset at decisions I make at work . . . My sister . . . asked if you were on drugs. My mother was also really concerned about your behavior.
>
> I love you Elba and I want all your dreams to come true. I see so much greatness in you, but lately you constantly seem lost. As a friend I don't know what to do because you seem to just keep pushing me away, constantly fighting me.
>
> You might not agree with my beliefs, but I know what my Father has done in my life and my husbands life. I know how he

> has changed me after I received him. ..My blessings come from my repentance and acceptance of Christ. I don't think someone can stop being lost or accomplish their dreams in complete fullness without him. The fact that every time I mention him you get offensive, turned off and push away tells me you know he's calling you, but your flesh refuses. He has so many great things planned for your life. He wants you to live in victory and stop being so upset all the time. He wants you to have peace and be happy. He loves you. For all this to occur you have to receive him.
>
> You can completely disagree. You can hate me. You can keep pushing me away. . .

Rubio responded later that day, inter alia:

> I have never been on drugs, did you ever care to think that maybe I'm distressed because of my personal life and problems with my family I can't control? . . . I don't disagree with your decisions at work . . . I'm not a religious person and I don't think the fact that you have accepted Jesus in your life means I need to follow suit. As long as I get the work done and the project finished I think that should be your major concern, not if I accepted Jesus into my life as my savior . . .

Hamilton responded, inter alia:

> There you go again being offended. I didn't say you were on drugs. I didn't think you were on drugs. My family and friends asked if you were on drugs based on their observations of you . . . .
>
> I am concerned about your well being and happiness because I am your friend. I care about you as a friend way before an employee. You haven't been happy for most of the time I've known you. I didn't say you had to accept Christ. I offered it as a suggestion because of my satisfaction in life. Just like you make recommendations on things to me that you like. Well, you said a few months ago you were dissatisfied. I wouldn't be a friend if I kept my faith a secret.
>
> As your boss, I have been concerned because Jeff [presumably, Jeff Chester, Respondent's Director of Quality Assurance] asked if you were ok and seemed out of it for the last couple of months. Your personal life greatly impacts your work. I have had the same challenge. Becoming a stronger person emotionally and not being lost in life will do wonders for your career. You won't be stuck if you fix these things. You will be highly promotable . . .
>
> You don't have to stay my friend. It's up to you. But I am not going to stay in a friendship with you being offended by me every other day or so. That's not a healthy friendship. Sometimes people grow apart and that's ok . . .
>
> If you just want to be co-workers, then that's fine . . . There is so much greatness and happiness waiting for you. But you will never achieve it being offended and tied up emotionally by so many things . . .
>
> Elba, this is about you loving yourself. You loving your life. You finding the true beauty of you . . .

Rubio testified that prior to these emails, Hamilton told her about the church that she joined and attended, and Rubio was "fine" with that because Hamilton was "sharing" that with her. However, she took offense at the November emails because Hamilton was telling her that she should be religious and that she would be promotable if she were. In January, Rubio complained to Steve Manuszak, Respondent's senior vice president of associate services, and gave him these emails that she received from Hamilton and he told her that he would have Scott Bixby, Respondent's senior vice president, and Chester talk to Hamilton, and a few days later she learned that Hamilton was spoken to about the incident. Carrington testified that he discussed Hamilton's emails and Rubio's religious discrimination charge with her and, on occasion, with employees Aparicio and Jeff Ambruster. Ambruster testified that Rubio told him about the November emails that she received from Hamilton and then forwarded the emails to him, saying, "Can you believe this?" Aparicio testified that in about January, Rubio told her that she was going to "file a complaint" against Hamilton and she showed her the November 7 emails. Aparicio read the emails, but found them "normal" and "just a comment."

Hamilton testified that in January she was informed that Rubio had made a religious harassment complaint against her with the Respondent. She was surprised at Rubio's complaint because up to a few months earlier they were very close friends and "talked about religion all the time" throughout their friendship. She knew that Rubio and she did not share the same religious beliefs, but Rubio never told her that she didn't want to discuss religion with her. She testified further that she did not resent Rubio's complaint and "it didn't impact my perspective of her as an employee because I looked at our relationship at work and our relationship personally as separate things." Bixby testified that he learned in January of Rubio's religious complaint against Hamilton and he and Manuszak "took action against that to make sure that whatever had occurred stopped." He believes that, within a week Chester, Hamilton's direct supervisor, met with her and told her that conversations about religion with an employee who reports to her, were inappropriate in or outside of work and that it should stop. Manuszak testified that he investigated Rubio's complaint about Hamilton and found that Hamilton's message was "inappropriate" despite the fact that in the past they were close friends. As a result, he "coached" Hamilton not to engage in those conversations with employees, but Hamilton did not receive any written discipline for this conduct. He also testified that in his conversation with Rubio about this complaint, she said that was only speaking for herself.

Rubio was discharged on March 4. Manuszak testified that the "immediate cause for her termination" was an instant message that she sent to Aparicio on February 25. He also testified that she was also discharged for harassing conduct toward Aparicio, where she misled and lied to her about her standing at the company. Aparicio began working as a part time employee for the Respondent in October 2010 (she was recommended for the job by Rubio) and later became a full time employee; Hamilton was her supervisor. At one point in the instant message, Rubio wrote, referring to Hamilton: "I want to try to see if the bitch says something racist again. Do you remember when she scolded Monica for speaking Spanish with Celina at her desk?

She can't say that to you. Let's talk Spanish when she comes back several times and see if she can get pissed off and say something stupid." Aparicio responded that it could not involve her because she can't afford to be out of work. Rubio then wrote: "She's super-mad with me because it's really difficult for you with this job. She's pissed off that I recommended you without knowing . . . And the only reason she hasn't fired you is because she has to prove that you can't do the job and because she was scolded for the guy who quit." She also wrote: "She didn't let me train you well in the beginning and she didn't instruct me or Paul and she got mad and she said that other people have understood it without problems and because much of her anger is that I have personal issues with her but she thinks that because I helped you I screwed her over more. That's why she has been harassing you lately." Rubio ended the instant message by writing:

> The truth is that I didn't know that this was going to happen to you. I didn't provoke her. She has a lot of anger towards me and she wants to screw me over and screw you over in the process. Either way, I only recommended you for one thing and she's not accustomed and doesn't like to train people but she got really paranoid and started screwing with me and messing with me because she hired you and for other stupidity with her ego. If you don't understand what she's explaining to you, you are worth nothing. If you don't understand something, just play dumb and ask me or Paul through IM. Everything is because of her ego. Nobody can tell or comment on anything . . . She's also bothered that you walk round the floor and that you pass the time and chat with people when she does the same thing . . .

Aparicio testified that when she began working for the Respondent, she and Rubio were friends, but "we slowly were not friends anymore" because Rubio was criticizing her work and was telling her that she was going to be fired. She first told her in December that she was going to be fired and repeated that threat every other day. Because of these threats, Aparicio began looking for another job and Rubio assisted her by sending her links to websites for other jobs. Aparicio also met with Hamilton and emailed her to ask if she was satisfied with her job performance and Hamilton told her that her work was okay. She did not tell Hamilton about Rubio's statements to her until about late February. At that time, Hamilton asked her why she was not performing as well as previously and why she was not communicating as she had been. At that time, she told Hamilton that Rubio told her that Hamilton was looking for an excuse to fire her, and she gave Hamilton the February 25 instant message. They had it translated from Spanish to English and on March 3, Hamilton forwarded it to Chester. His only comment was "unbelievable." A few minutes later, Hamilton sent an email to Chester, stating:

> During the time Elba sent this is when she sent me the IM saying that she wanted to strangle Michelle for not doing her work and that Paul felt the same way. No wonder the poor girl was scared of losing her job and stopped talking. Every move she made she was being told I wanted to fire her. I was actually encouraging her positive energy. She must have been so confused. This has been going on since December!

There was also an instant message between Rubio and Hamilton dated December 29, 2010, in which Hamilton, referring to Aparicio, states: "Some of the stuff she did before didn't get done correctly so she needs to really learn what she has already been taught and not just do stuff to get it done." Hamilton was questioned by counsel for the General Counsel about this statement and testified, "That's not saying that I had concerns about her job performance . . . everyone makes mistakes." What she was trying to convey to Rubio in this IM was that Rubio was asking her to perform work that was outside the scope of her job: "She didn't do it correctly because it wasn't her job." Asked if Aparicio performed all her work correctly, she testified, "I don't think that Ms. Aparicio did everything perfectly, nor do I expect that from my staff." Hamilton also testified that she had no "input in the decision" to fire Rubio, and only learned about it a few hours before it took place. Manuszak testified that there were several reasons why Rubio was discharged. One was the "egregious" harassment of Aparicio, by trying to intimidate her to quit, by lying to her by telling her that she wasn't meeting the company's expectations. The other reason was "being manipulative and vindictive "to Hamilton by trying to catch her doing something wrong." The "vindictive" nature of her actions toward Aparicio and Hamilton constituted gross misconduct. Rubio testified that Aparicio had a lot of problems keeping up with the work in the department and would ask her the same questions repeatedly. In addition, Hamilton berated her for recommending Aparicio for the job and said that she should have known that she would have "issues" with the work. She testified further that she did not recall telling Aparicio that Hamilton was looking for a way to get her fired, and that she did not encourage her to look for jobs elsewhere. Carrington testified that he spent about a week and some follow up time training Aparicio, which was more time than usual to train a new employee. He felt that her performance seemed to be lacking compared to other past and present employees in the department and in January and February he told Hamilton that Aparicio was making mistakes, that she would repeatedly ask the same questions, and that because her work was below par the department was behind in its work.

Carrington became aware that Rubio was discharged on March 4 when he saw her walking away from her desk toward the building exit, and shortly thereafter, Bixby called him into his office. Carrington testified that Bixby said that Rubio had been discharged and that his "name had come up as being connected with hers." Bixby told me that he had played a significant role in his being reinstated after his layoff in 2009 and said, ". . . that I could really have a future with the company if I stopped talking to her and tried to move on and learn how to work with Merissa." He also told Carrington that he could "come in with a clean slate on Monday." Bixby testified that after Rubio was discharged on March 4, he met with employees on Hamilton's team, including Carrington and Aparicio. He told Carrington that his name was on the recent instant message between Rubio and Aparicio and that ". . . he was sometimes mentioned in the same context as Elba's disruption," referring to the IM between Rubio and Aparicio. Bixby also testified that he initially told him that Rubio had been discharged and that he

(Carrington) had done very good work for the company and he had taken a personal interest in him including rehiring him after he was laid off as a result of a reduction in force, and that he handled that layoff in a professional manner. Since then he had received positive reports about his performance, "And I told him that I was going to give him a little bit of advice, and it was free advice." He told him, "I can't tell you what to do inside of work, outside of work, how to spend your time. But when you're at work you have an opportunity to get involved in all the positive things that we do or you can go in a different path, and that's up to you. My advice to you is Monday, as far as I'm concerned, this is behind us. We'll start with a fresh clean slate. And there are no implications around Rubio's termination."

Carrington testified that after Rubio's discharge, he and Rubio discussed his obtaining his work computer and accessing company records and forwarding these emails to Rubio and to his personal email account. Rubio testified that she asked him if he felt comfortable transferring the emails, and he said that he did. He testified that their purpose was: "To highlight . . . the complaint she had made and the discrimination she felt she had endured, and to show . . . a timeline of the events." He was looking to transfer emails from Hamilton to Rubio about converting her to Christianity, emails to show retaliation for her complaints, such as emails about increased workload or increased work pressure, as well as emails showing favorable treatment of Aparicio. In addition, he felt that the forwarded emails might be needed to protect himself. He was concerned about his job security after his March 4 discussion with Bixby about his connection to Rubio and he thought that emails praising his work performance would be helpful to him in case his job status was affected. Carrington and Rubio went to the Respondent's facility at about 7 a.m., Saturday, March 5, not a regular work day for Carrington. He swiped his security card provided by the Respondent in order to gain access to the building, went into his office, took his computer home, and transferred the emails to Rubio and to his personal email account. He testified that he previewed each of the emails that he transferred on March 5 and 6 and that as far as he knows, all of the emails that he forwarded on those days were emails that Rubio had already received. He did not believe that forwarding these emails would be a problem until Monday, March 7, when he was discharged for sending these emails. On cross examination, Carrington testified that in order to gain access to the Respondent's website, he first had to log in to his computer using his work password, and that some of these emails contained vendor names, customer names, manufactures codes, brand names, prices charged the Respondent by its vendors, rebates, and the names, addresses and other contact information for employees of the Respondent's vendors. The number of emails that he forwarded exceeded 300.

Guy Babbitt, who is employed by the Respondent as Chief Solutions Architect, testified that in early March, he became aware of some "unusual activity" taking place; Carrington had forwarded in excess of 300 emails to Rubio, as well as to his personal email account. In looking at the subject lines of the emails, he saw a number that were "questionable," among them compensation information, bonus information and other subjects ". . . which I knew instinctively was definitely confidential information. I wasn't sure why it would be leaving the company." He reported his findings to Manuszak and sent him an Excel spread sheet listing all the emails that were sent by Carrington. When asked how this transmission compared with others that he has seen during his employment with the Respondent, he testified: "I have never seen anything like this." Babbitt also testified that the Respondent has confidentiality agreements with some of its vendors and some of its customers, and there is information available on the Respondent's computer system that vendors and customers would consider trade secret or proprietary information. He was asked, based upon his review of the information that Carrington sent out on March 5 and 6, was there any such information in that material. He answered: "Without a doubt."

Bixby testified that he reviewed a large number of the emails that Carrington transferred on March 5 and 6; they included costing information, item information and specifications, a listing of the Respondent's suppliers (vendors), and customers, as well as the volume and the products purchased from certain vendors, and the products sold to customers together with the prices charged for these products. All of these subjects are confidential and proprietary for the Respondent, and if any of it was obtained by a competitor of the Respondent, it could result in a substantial loss of business. He looked at some of the emails and opened and reviewed the complete attachments of from 10 to 50 of them. His review of these emails revealed information which might have violated the Respondent's confidentiality agreements with some of its vendors and customers. After seeing this list of emails, and reviewing some of them, he met with Manuszak and Ernie Snyder and decided that Carrington had to be discharged. The reason:

> To me, it was just very simple. It was a clear and egregious exportation of an absolutely unprecedented volume of proprietary and sensitive trade secrets to a terminated employee and also to his home email address. I could not fathom why [sic] possible business reason could justify such an act…but the other was, what was he doing that day? Was he continuing that same process and exporting thousands more email? I had no idea, so that crossed my mind, yes.

Hamilton testified that she reviewed all of the emails that Carrington transmitted on March 5 and 6, and estimates that 80 to 90 percent of them contained confidential and proprietary information, such as customer and vendor names, prices and product specifications; however she did not participate in the decision to discharge Carrington and only learned of it after he had been fired. Manuszak testified that when he was fully informed of the emails that Carrington transmitted on March 5 and 6, he saw just from the subject line of the emails, that they included information about their suppliers, customers, and products, and it was "the most egregious violation of a confidentiality agreement that I've seen in twenty years." Because of that, he felt that there was no need to meet with, and speak to, Carrington before terminating him. He also testified that in his 5 years of employment with the Respondent, he knew of only one other incident where an employee transmitted company proprietary material outside the company. That employee was Mark Lambert, who was discharged when it was discov-

ered that he sent confidential information, that Respondent considered proprietary, to a former employee.

As stated, supra, at the close of his case, counsel for the General Counsel amended the complaint to add two allegations: that the Respondent, by Manuszak, promulgated an overly broad rule prohibiting employees from giving personal references, and that the Respondent maintained an overly broad rule prohibiting employees from disclosing personal telephone numbers. As to the former allegation, on March 7, Rubio sent an email to ten individuals stating:

> It was a pleasure working with you over the past 3 years. I was laid off last Friday for blowing the whistle on manager abuse in January, no further reasoning was provided. I would like to request personal references from you, as I begin my job search. If you do not feel you can provide a recommendation, I understand. Thank you.

One of the individuals that this was sent to, forwarded it to Sherry Donald, who had been Rubio's supervisor at Gampac, stating only "FYI", and she forwarded it to Manuszak, stating, "Thought you should know this is going around to our associates." Manuszak then forwarded it to Babbitt, asking: "Can we block incoming emails from Elba's personal email address to any SGA associate?" Babbitt responded: "Future emails will now be blocked," and Manuszak responded, "Thanks! I'd also like to get copies of all correspondence sent from and sent to Elba's personal email address the last 90 days." Rubio testified that two of the recipients of her email, Hilda Phillips and Robin Cook, and possibly a third, Rich Clesiak, may have been supervisors; the others were rank-and-file employees. Three of the 10 individuals responded to Rubio that they would be happy to be a personal reference for her; Manuszak testified that none of them were disciplined for their response. Babbitt testified that Manuszak never asked him to check the incoming or outgoing emails from any of the 10 individuals named in Rubio's email; they were only looking for inbound emails from Rubio.

Manuszak testified that the Respondent has a policy forbidding only supervisors and managerial employees from giving references to former employees, although it is not contained in the employees' handbook; it is covered in a training session. In the affidavit that he gave to the Board, on this subject he stated: "The employer has a policy that any references go through the Employer's associate services department [generally referred to as Human Resources] and the associate services department would confirm only the dates of employment to anyone who called to inquire about a former employee of the Employer." Manuszak, who has approximately 20 years experience in human resources, testified that a rule such as this prohibiting supervisory employees from giving references for former employees, on their own, is "extremely common" because information given out by company representatives can be considered libelous or slanderous. However, nonsupervisory employees are not considered agents of the employer for these purposes. When he received the email that Donald forwarded to him on March 7, he wasn't totally familiar with the duties performed by all ten recipients of the Rubio's email, but he knew that one of them, Cook, was a supervisory employee. He did not speak to Cook at that time about violating the Respondent rule, because, "I had bigger matters to attend to on March 7." In regards to the allegation that the Respondent has a rule prohibiting employees from disclosing employees' personal telephone numbers, he testified, "No, we don't have a policy regarding disclosure of personal cell phone numbers."

The initial allegation involves Bixby's discussion with Carrington on March 4, after Rubio was fired. It is alleged that by this conversation the Respondent violated Section 8(a)(1) of the Act, by interrogating Carrington about his concerted activities, orally promulgated an overly broad and discriminatory rule prohibiting its employees from talking to other employees, threatened him with unspecified reprisals if he engaged in concerted activities, and created the impression among its employees that their concerted activities were under surveillance by the Respondent. Carrington testified that after Bixby told him that Rubio had been discharged and that he (Bixby) played a significant role in his reinstatement after his layoff in 2009, he said that Carrington could have a future with the company if he stopped talking to Rubio and try to move on and learn how to work with Hamilton, and that he would come in with a "clean slate" on Monday. Bixby testified that he told Carrington that his name was included in Rubio's recent instant messages to Aparicio and that he was mentioned in the "same context as Elba's disruption." He complimented him on his work and offered him "a little bit of . . . free advice." He said, "I can't tell you what to do inside of work, outside of work . . . But, when you're at work, you have an opportunity to get involved in all the positive things that we do or you can go in a different path, and that's up to you. My advice to you is Monday, as far as I'm concerned, this is behind us. We'll start with a fresh clean slate. And there are no implications around Rubio's termination." This is a difficult credibility determination because neither Carrington nor Bixby clearly lacked credibility. Although I found Carrington to be somewhat evasive in his testimony in other areas, I found Bixby's testimony about this conversation unconvincing. It sounded more like something that was prepared for trial rather than a spontaneous discussion with Carrington about his relationship with Rubio. I therefore credit Carrington's version of this conversation.

As Bixby did all the talking, and he never questioned Carrington about his concerted activities, or those of other employees including Rubio, I recommend that the allegation that Bixby interrogated Carrington (Paragraph 4(g)(1) be dismissed. As there is also no evidence to support the allegation that Bixby, in this conversation, created an impression among its employees (actually, in this situation, Carrington) that their concerted activities were under surveillance by the Respondent, I also recommend that this allegation (Paragraph 4(g)(4)) be dismissed as well. The remaining two allegations, paragraphs 4(g)(2) and 4(g)(3), are more difficult. It could be argued that Bixby's statement that Carrington could really have a future with the company if he stopped talking to Rubio and try to move on and learn how to work with Hamilton, could be a discriminatory rule prohibiting employees from talking to other employees, as well as an implied threat to Carrington if he engaged in concerted activities. On the other hand, it could be argued that Rubio had already been discharged and was no longer an employee due to her harassment of Aparicio, as set

forth in the instant message referred to above, as well as her attempt to "bait" Hamilton to make a mistake, and that Carrington, to some degree, participated in the plans set forth in this instant message, so Bixby's statement to him was not a threat or an unlawful prohibition, but was meant as a helpful suggestion on how to maintain his excellent work performance. Communications with a discharged employee can, under certain circumstances, constitute concerted activities. In *Buck Brown Contracting Co., Inc.,* 283 NLRB 488, 489 (1987), employee Kelly had been fired by the employer and fellow employee Bridges spoke to the employer and asked if he could be rehired. Bridges was fired and the Board found that Bridges' attempt to assist Kelly with procuring employment with the employer was protected concerted activity. The instant matter is distinguishable. There is no evidence that Carrington and Rubio were at that time preparing to take any lawful group action against the Respondent, nor did Bixby's statement directly address any group action. Rather, I find that the words that Bixby used were meant to convince Carrington not to repeat the unprotected conduct that they engaged in with the instant message to Aparicio, and I therefore recommend that this allegation, and paragraph 4(g) of the complaint be dismissed in its entirety.

Paragraph 4(c) of the complaint alleges that since about February 22 the Respondent has maintained an overly broad and discriminatory rule prohibiting employees from disclosing employee cell phone numbers although, at the hearing, counsel for the General Counsel stated that this amendment referred to disclosing "personal telephone numbers." Manuszak testified that the Respondent does not have a policy regarding the disclosure of personal cell phone numbers. As there was no other evidence supporting this allegation, I recommend that it be dismissed.

Paragraph 4(h) alleges that on or about March 7 the Respondent, by Manuszak, promulgated an overly broad and discriminatory rule prohibiting employees from providing personal references to other employees. The sole support for this allegation is the emails that were sent by Rubio on March 7 to 10 individuals employed either by the Respondent or another subsidiary of Service Group of America, Inc. Either one or two of these ten individuals was a supervisor; the rest were rank and file employees. The email stated that she was "laid off" on March 4, and "I would like to request personal references from you, as I begin my job search." This email was forwarded to Donald, who forwarded it to Manuszak stating: "Thought you should know this is going around to our associates" and Manuszak forwarded it to Babbitt, asking: "Can we block incoming mails from Elba's personal email address to SGA Associates?" Six minutes later Babbitt responded: "Future emails will now be blocked." Three of the 10 individuals responded to Rubio that they would be happy to be a personal reference for her and these employees were not disciplined. Manuszak's uncontradicted testimony establishes that Respondent did not have a policy forbidding employees from providing references to other employees; only supervisors were prohibited from giving references, and Manuszak's explanation for the rule was certainly a reasonable one. The only evidence supporting a rule prohibiting employees from giving personal references is the fact that the Respondent blocked her incoming emails after it became aware of her March 7 emails. However, that could also be explained by the fact that she had been fired, that Carrington had transferred over 300 emails to her, and they could see no valid reason for her to communicate with the employees. More importantly, there was no testimony that any employee was aware of any such restriction, and none of the employees who agreed to give a reference to Rubio were disciplined. I therefore recommend that this allegation (Par. 4(h)) be dismissed.

The final allegations are that the discharges of Rubio on March 4, and Carrington on March 7 violate Section 8(a)(1) of the Act. The complaint alleges that they were discharged because they engaged in, or because the Respondent believed that they engaged in, protected concerted activities by discussing with each other and complaining to the Respondent about Respondent's national origin and religious discrimination against its employees, favoritism of certain employees, insufficient training of employees and by sending and forwarding emails to each other concerning the wages, hours, and working conditions of the Respondent's employees.[2] In regards to credibility, between Aparicio, Carrington, Rubio, and Hamilton, I found Aparicio clearly the most credible. Although she was still employed by the Respondent, and had been harassed at work by Rubio, it appeared to me that she was attempting to testify in an open and truthful manner. In addition, her testimony was supported by the February instant message. On the other hand, I found Rubio to be the least credible of the group whose testimony was often evasive on cross examination. Hamilton and Carrington were, at times, evasive in their testimony, but, at times were also fairly credible. Under *Wright Line,* 251 NLRB 1083, 1089 (1980), in Section 8(a)(3) cases or violations of Section 8(a)(1) turning on employer motivation, the General Counsel must first make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. If that is established, the burden shifts to the employer to demonstrate that the same action would have been taken even in the absence of the protected conduct. I find that counsel for the General Counsel has not satisfied his initial burden here. The only credible evidence concerning possible concerted activities here is Rubio's complaint to the Respondent about Hamilton's inappropriate November email regarding their disparate religious beliefs. One can certainly understand Rubio's discomfort upon receiving this email, but the undisputed evidence establishes that Hamilton was spoken to about it shortly after Rubio reported it, and was told that it was not appropriate either at work or outside of work to communicate with employees in that manner, and no similar emails followed. In addition, there is no credible evidence that the Respondent harbored animus toward Rubio as a

[2] Because I found that these allegations are clearly without merit, there are a number of issues that need not be discussed here: whether Hamilton improperly revealed the results of Ambruster's drug test to Rubio and Carrington; whether Rubio went into the Respondent's facility on March 5 with Carrington; whether Rubio got mad and slammed a chair and a keyboard at work, as testified to by Bixby; whether Carrington "signed" a confidentiality agreement for the Respondent electronically; and whether Carrington complied with the Respondent's subpoena to provide all the the emails that he sent on March 5 and 6; he didn't.

result of her complaint about the religious email and there is no evidence of any connection between the complaint that she made and her discharge 2 months later. Rather, the evidence establishes that the February 25 instant message between Rubio and Aparicio resulted in her discharge a week later. I therefore recommend that this allegation be dismissed.

The final allegation relates to Carrington's discharge on Monday, March 7. The complaint alleges that he was fired because he and Rubio engaged in protected concerted activities, and because he violated Respondent's confidentiality and nondisclosure Rules. Carrington and Rubio discussed this transfer of emails after Rubio was fired and he told her that he felt comfortable doing so. He testified that he did it to "highlight" Rubio's complaint about the discrimination that she had endured and to show "a timeline of the events," and that he attempted to transfer emails regarding Hamilton's attempt to convert her to Christianity, as well as emails relating to increased work pressure or favoritism toward Aparicio. In addition, after his March 4 conversation with Bixby, he was concerned about his job security and attempted to transfer emails that praised his work performance. If this was his true purpose, he certainly accomplished it in the wrong way. Since he obtained his computer early Saturday morning, he probably had 2 days to collect the relevant and appropriate emails before the Respondent became aware of it and, possibly, cut off his email access. If he had done so, and had only forwarded emails relating to Rubio's and his work performance and work related issues, counsel for the General Counsel could then reasonably argue that he was engaged in protected concerted activities. However, instead of accessing and copying appropriate emails relating to their work and their complaints, he indiscriminately copied emails related to the operation of the company's business, having no relation to their terms and conditions of employment. This accessed information included the names of vendors and customers, prices charged by its vendors, the products sold to its customers together with the prices for these products, the manufactures codes and brand names, as well as other information. By whatever name, whether proprietary or confidential, this is information that any company would not want out of its possession. More importantly, in this situation, accessing this information does not constitute protected concerted activities. I therefore find that counsel for the General Counsel has not sustained his initial burden under *Wright Line,* supra, and recommend that this allegation be dismissed.

CONCLUSIONS OF LAW

1. The Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The provisions relating to compensation and confidentiality contained in the Respondent's handbook and the restriction on discussing payroll or employee information about other employees, as contained in Respondent's confidentiality and nondisclosure agreement, could chill employees in the exercise of their Section 7 rights, and therefore violate Section 8(1)(1) of the Act.

3. The Respondent did not further violate the Act as alleged in the amended complaint.

THE REMEDY

Having found that the Compensation provision contained in its employee handbook, and the restriction on discussing payroll or employee information regarding other employees violate the Act, I recommend that the Respondent be ordered to rescind these provisions and to notify all of its employees electronically that these provisions has been rescinded from the Employee handbook and the confidentiality and nondisclosure agreement. Respondent is also ordered to post the Board notice at the facility involved here.

Upon the foregoing findings of fact, conclusions of law, and on the entire record, I hereby issue the following recommended[3]

ORDER

The Respondent, Food Services of America, Inc., a subsidiary of Services Group of America, Inc., Scottsdale, Arizona, its officers, agents, successors and assigns, shall

1. Cease and desist from

(a) Enforcing the compensation provision contained in its employee handbook, as further explained by the confidentiality provision contained there.

(b) Enforcing the restriction on discussing payroll or employee information regarding other employees as set forth in the confidentiality and nondisclosure agreement.

(c) In any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Notify all of its employees electronically that these provisions will no longer be enforced.

(b) Within 14 days after service by the Region, post at its facility in Scottsdale, Arizona, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 22, 2011.

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[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the remaining allegations contained in the amended complaint be dismissed.

Dated, Washington, D.C. March 27, 2012

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT enforce the compensation and confidentiality provision contained in our employee handbook, WE WILL NOT enforce the restriction on discussing payroll and employee information regarding other employees as contained in our confidentiality and nondisclosure agreement, and WE WILL NOT prohibit you from discussing your wages or terms and conditions of employment with others.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights as guaranteed you by Section 7 of the Act.

WE WILL rescind the compensation and confidentiality provisions contained in our employee handbook and the restriction on discussing payroll or employee information regarding other employees as contained in our confidentiality and nondisclosure agreement and will notify all of our employees electronically that we have done so.

FOOD SERVICES OF AMERICA, INC., A SUBSIDIARY OF SERVICES GROUP OF AMERICA